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No. 05-1148

In the Supreme Court of the United States

C.D. OF NYC, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a claim based on alleged theft of mail by Postal Service employees "aris[es] out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. 2680(b), and thus is excepted from the Federal Tort Claims Act's waiver of sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is *reprinted in* 157 Fed. Appx. 428. The opinion of the district court (Pet. App. 6a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005. The petition for a writ of certiorari was filed on March 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, diamond and jewelry merchants in New York City, sued the Postal Service in the United States District Court for the Southern District of New York. Their complaint alleged that, over a period of two years, two Postal Ser-

vice employees had conspired with two of petitioners' employees to steal jewelry from parcels brought to the Rockefeller Center Post Office for shipment to petitioners' customers. According to the complaint, petitioners' employees would hand the parcels to the Postal Service employees along with an original and one copy of a manifest. On the original manifest, the Postal Service employees would indicate receipt of all packages listed; petitioners' employees would return that document to their employer. On the duplicate manifest kept in Postal Service records, however, the Postal Service employees allegedly would strike entries for some of the packages. They would then, according to the complaint, keep those packages for themselves. Because of this conduct, petitioners allege, approximately $1.5 million in jewelry never reached petitioners' customers. Pet. App. 7a.

Petitioners' complaint, filed under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, asserted claims for conversion, money had and received, unjust enrichment, negligent supervision, concerted action, and civil conspiracy. Pet. App. 2a, 7a. The government moved to dismiss for lack of jurisdiction, arguing, *inter alia*, that the suit fell within 28 U.S.C. 2680(b), which excepts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the FTCA's waiver of the United States' sovereign immunity. Pet. App. 2a-3a, 7a.

2. The district court granted the government's motion and dismissed the complaint. Pet. App. 6a-18a. The court noted that "[petitioners'] packages were allegedly stolen from the mails" and "the root of all [their] claims is the conversion of the packages." *Id.* at 11a. Thus, the court explained, all of petitioners' claims "fall squarely within the Postal Matter Exception," *i.e.*, 28 U.S.C. 2680(b), and "[f]or this reason alone the Court lacks jurisdiction over all [petitioners'] claims." Pet. App. 11a.

The court also found two additional independent jurisdictional flaws. First, the court held that, to the extent petitioners' claims "arise out of the fraudulent misrepresentations in the postal manifests," the FTCA's intentional torts exception, 28 U.S.C. 2680(h), divested it of jurisdiction. Pet. App. 13a.[1] Second, the court held that it lacked jurisdiction because a private employer would not be liable under New York state law for the conduct alleged. Pet. App. 13a-18a; see 28 U.S.C. 1346(b)(1) (limiting the FTCA's jurisdictional grant to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); see also 28 U.S.C. 2674 (similarly defining the substantive scope of FTCA liability).[2]

3. The court of appeals affirmed in a summary order. Pet. App. 1a-5a. The court noted that in *Marine Insurance Co.* v. *United States*, 378 F.2d 812, 814 (2d Cir.), cert. denied, 389 U.S. 953 (1967), it had held that "theft of parcels by a federal employee responsible for the supervision of mail * * * falls within the [postal matter] exception." Pet. App. 3a. In this case, the court observed, "[petitioners] complain of mail brought to a United States Post Office, handed to USPS employees, and stolen by the persons employed by the USPS to handle mail." *Ibid.* Accordingly, the court of appeals held, *Marine Insurance* governed this case, and the district court

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[1] The intentional torts exception provides that the FTCA's waiver of sovereign immunity "shall not apply" to, *inter alia*, "[a]ny claim arising out of * * * misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h).

[2] For the same reason, the court held that petitioners' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. Pet. App. 18a.

was correct to dismiss the suit for lack of jurisdiction. *Id.* at 3a-4a.[3]

ARGUMENT

Petitioners contend (Pet. 9-17) that the court of appeals erred in holding that 28 U.S.C. 2680(b) bars a claim for injuries arising from the theft of mail, and that the decision below conflicts with this Court's decision in *Dolan* v. *United States Postal Service*, 126 S. Ct. 1252 (2006). Notwithstanding these contentions, the decision below is correct and conflicts with no decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. a. The court of appeals correctly concluded that the postal matter exception bars a claim against the United States arising out of the alleged theft of postal matter. The FTCA waives the United States' sovereign immunity in certain cases involving "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," 28 U.S.C. 1346(b)(1), and renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674. That waiver is qualified by, *inter alia*, the postal matter exception, which preserves sovereign immunity as to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b); see *Dolan*, 126 S. Ct. at 1256. Here, petitioners allege that, because of certain employees' misconduct, their customers did not receive parcels intended to reach them through the mail. Because petitioners' claims thus "aris[e] out of the loss * * * of letters or postal matter," 28 U.S.C. 2680(b), they are barred by the plain language of the postal matter exception.

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[3] The court did not reach or discuss the district court's additional grounds for dismissal. Pet. App. 4a.

b. That result is not, as petitioners contend (Pet. 12), "at odds" with this Court's decision in *Dolan*. The petitioner in *Dolan* alleged that she had been injured when she tripped on mail that a postal employee had negligently left on her porch. In rejecting the government's assertion that the petitioner's claim arose out of "negligent transmission" of mail and was thus barred by the postal matter exception, the Court noted that the statutory terms "loss" and "miscarriage" "refer to failings in the postal obligation to deliver mail in a timely manner to the right address." *Dolan*, 126 S. Ct. at 1257. "[I]t would be odd," the Court reasoned, "if 'negligent transmission' swept far more broadly" to include injuries, such as those alleged in *Dolan*, "that happen to be caused by postal employees but involve neither *failure to transmit mail* nor damage to its contents." *Ibid.* (emphasis added). This case plainly involves "failure to transmit mail," as contemplated by *Dolan*, and thus falls within the postal matter exception.

The Court in *Dolan* did state that, "as both parties acknowledge, mail is 'lost' if it is destroyed or misplaced and 'miscarried' if it goes to the wrong address." *Dolan*, 126 S. Ct. at 1257. But that brief discussion did not, as petitioners assert (Pet. 9, 12), limit the postal matter exception to mail that is "lost" only in the sense that it is "destroyed or misplaced," or "miscarried" only in the sense that it "goes to the wrong address." Rather, *Dolan* simply cited these as examples of "failings in the postal obligation to deliver mail in a timely manner to the right address," 126 S. Ct. at 1257, and it made no distinction between inadvertent and intentional failures of delivery. As the Court explained, Congress intended the postal matter exception to preserve immunity for "injuries arising, directly or consequentially, because mail either *fails to arrive at all* or arrives late, in damaged condition, or at the wrong address." *Id.* at 1258 (emphasis added). In other words, the United States is immune from suit for

"*nondelivery* or late delivery * * * or from negligent handling of a mailed parcel," for these harms "are the sort primarily identified with the Postal Service's function of transporting mail throughout the United States." *Ibid.* (emphasis added).

The claims asserted in this case stem entirely from the "nondelivery" of parcels allegedly stolen by Postal Service employees—*i.e.*, from those parcels' "fail[ure] to arrive at all"—and not from some injury unrelated to a failure of delivery. Accordingly, the court of appeals' conclusion that the postal matter exception bars these claims is fully consistent with *Dolan*.

c. The government is aware of no court decision finding a mail-theft claim to be outside the scope of the postal matter exception. The Second Circuit, the only court of appeals to address whether the exception applies to such a claim, has twice held—in this case and in *Marine Insurance Co.* v. *United States*, 378 F.2d 812, cert. denied, 389 U.S. 953 (1967)—that it does so apply. District courts have held the same. See *Watkins* v. *United States*, No. 02 C 8188, 2003 WL 1906176, at *5 (N.D. Ill. Apr. 17, 2003) (noting that if "loss" did not include employee theft, "litigants would simply recast their lost-mail claims as ones for mail theft in order to survive the jurisdictional bar"); *Sump* v. *USPS*, No. 97-4133 RDR, 1997 WL 808658, at *2 (D. Kan. Dec. 19, 1997); *Staples* v. *Christ Universal Temple*, No. 87 C 5577, 1987 WL 13441, at *2 (N.D. Ill. July 1, 1987).[4]

2. Nonetheless, petitioners present a variety of reasons why their claim ostensibly does not fall within the postal matter exception. None of those proffered reasons merits this Court's consideration.

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[4] See *Anderson* v. *USPS*, 761 F.2d 527 (9th Cir. 1985) (holding that the postal matter exception bars claims against the United States when mail is stolen *from* a postal employee).

a. Petitioners' contention (Pet. 12-14) that the postal matter exception is inapplicable to intentional acts, like the thefts alleged here, is incorrect. As noted above, the FTCA waives sovereign immunity for both "negligent" and "wrongful" conduct by federal employees, 28 U.S.C. 1346(b)(1). But it also enumerates exceptions to that waiver, and many of those exceptions make no distinction between intentional and unintentional conduct. See, *e.g.*, 28 U.S.C. 2680(a) (claim based on exercise of discretionary function, "whether or not the discretion involved be abused"); (c) (claim based on assessment of tax or customs duty); (f) (claim for damages caused by quarantine); (h) (claim arising out of specified intentional torts); (i) (claim for damages caused by monetary regulation or fiscal operations of the Treasury); see also *Dolan*, 126 S. Ct. at 1259 (noting the "sweeping language" of some FTCA exceptions). Thus, it is not at all unusual for an FTCA exception to apply to intentional conduct.

Against that background, it is evident that "loss" and "miscarriage" do not refer only to negligent conduct. First, the postal matter exception uses the word "negligent" to qualify only "transmission"; the preceding terms "loss" and "miscarriage," in contrast, stand unmodified. See 26 U.S.C. 2680(b). The natural inference is that, while the postal matter exception applies to only that transmission which is negligent, the exception applies to all loss and miscarriage of mail, even when it does not result from mere negligence. Indeed, if the postal matter exception were construed to apply only to negligent conduct in all instances, the use of the term "negligent" to modify "transmission" would be superfluous. That construction should therefore be avoided. See, *e.g.*, *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (noting "the doctrine that legislative enactments should not be construed to render their provisions mere surplusage").

Second, as *Dolan* noted, the purpose of the postal matter exception is to shield the Postal Service from liability for "injuries arising, directly or consequentially, because mail either fails to arrive at all, or arrives late, in damaged condition, or at the wrong address." *Dolan*, 126 S. Ct. at 1258; see *id.* at 1257 (counseling reliance on, *inter alia*, "the purpose and context of the statute"). Any of those mishaps, as described by the Court, could result from either negligent or intentional conduct by postal employees.

For both of these reasons, it is unsurprising that petitioners are unable to identify any decision limiting the "loss" and "miscarriage" prongs of the postal matter exception to claims arising from negligent, as opposed to intentional, conduct. In *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), on which petitioners principally rely (Pet. 13), the Central Intelligence Agency had intentionally opened letters sent to and from the Soviet Union, then returned the letters to the mails for delivery to the addressees. Although the court did state that "[t]he language of the exception * * * indicates that it was not aimed to encompass intentional acts," 588 F.2d at 328, the context makes clear that the court was referring only to the "negligent transmission" component of the exception. See *ibid.* ("Had Congress intended to bring *intentional* disturbance of the integrity of a letter within the postal exception, it would not have used the term 'negligent transmission.' Nor were the letters lost or miscarried. 'Miscarriage' in the context of mail means misdelivery."). Notably, the court saw no conflict with its prior ruling in *Marine Insurance Co.*, *supra*, which barred a claim for the "loss" of a mailed package through theft by a customs employee. See *Birnbaum*, 588 F.2d at 328 n.20.[5] *Avery* v. *United States*, 434 F. Supp. 937

[5] Petitioners otherwise cite (Pet. 13) a bevy of other cases, none of which excludes intentional misconduct from the scope of "loss" or "miscarriage." *Barbieri* v. *Hartsdale Post Office*, 856 F. Supp. 817

(D. Conn. 1977), which prefigured *Birnbaum*, held that the postal matter exception did not bar suit on materially identical facts. See *id.* at 945.

In any event, as the district court apprehended (Pet. App. 11a-13a), the nature of the intentional conduct alleged in this case provides another reason why petitioners' claims are barred. To the extent those claims rely on the alleged fraudulent misrepresentations in the postal manifests, 28 U.S.C. 2680(h) excepts the claims from the FTCA's waiver of sovereign immunity. See 28 U.S.C. 2680(h) (stating that the waiver does not apply to claims arising from, *inter alia*, "misrepresentation" or "deceit").

(S.D.N.Y. 1994), was a suit claiming damages because an erroneous postmark led to a tax penalty; the court held the postal matter exception inapplicable because the mail was "neither misdelivered nor lost," nor was it negligently *transmitted* to the recipient. *Fridman* v. *Postmaster General*, No. CV-95-4049, 1996 WL 90543 (E.D.N.Y. Feb. 26, 1996), was a suit for alleged negligent failure to forward the plaintiff's mail; the court found the postal matter exception "squarely" applicable. *Id.* at *1. Similarly, in *Sheldon Jewelry Co.* v. *United States*, No. EP-00-CV-288-DB, 2001 WL 681247 (W.D. Tex. Mar. 29, 2001), the court held that the "negligent transmission" component of the postal matter exception barred suit for the negligent delivery of a package to a person who falsely represented herself as the intended addressee. *United States* v. *Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763 (N.D. Tex. 2002), involved a mail pre-sort operator's claims that the Postal Service had failed to prevent it from fraudulently understating the amount of mail it deposited with the Postal Service for transmission, and that the Postal Service had given refund checks to the operator's "rogue employee." *Id.* at 766, 774. The court held that, because the case "involve[d] problems unrelated to the actual delivery of mail to the ultimate recipient," the postal matter exception did not bar the claims. *Id.* at 778. Finally, the court in *Suchomajcz* v. *United States*, 465 F. Supp. 474 (E.D. Pa. 1979) (cited at Pet. 10 n.6), found that the term "negligent transmission" did not encompass a claim based on the Postal Service's failure to prevent illegal flammable materials from entering the mails, where those materials caused the deaths of several children.

b. Petitioners also assert (Pet. 14-15) that the Postal Service cannot claim the benefit of Section 2680(b) because it has disallowed petitioners' insurance claims for the allegedly stolen parcels. That assertion is without merit. Petitioners' postal insurance claims are governed by the terms of the relevant insurance contracts, not by the FTCA. Moreover, petitioners did not place the insurance claims in issue in the complaint, nor did they introduce into evidence the disallowance notices (Pet. App. 19a-20a) on which they now rely.[6] Thus, unsurprisingly, the court of appeals did not address this contention, and there is no reason why this Court should do so.

In any event, there is no inconsistency between the Postal Service's denial of petitioners' insurance claims and the government's assertion of sovereign immunity in this action. See *Dolan*, 126 S. Ct. at 1259 ("[L]osses of the type for which immunity is retained under § 2680(b) are *at least to some degree* avoidable or compensable through postal registration and insurance." (emphasis added)). The Postal Service's stated reason for denying petitioners' insurance claims—namely, that "the article was not rightfully in the mail since it had not been ordered by the addressee," Pet. App. 19a, 20a— may raise a question of contractual interpretation; it does not suggest, however, that the parcels' loss somehow falls outside the postal matter exception. To the contrary, petitioners allege that the parcels in question were purloined after they had been committed to the Postal Service for processing and transmission. See Pet. 5. Accordingly, the Postal Service's denial of petitioners' insurance claims does not place their FTCA claims outside the scope of the postal matter exception.

c. Finally, petitioners contend (Pet. 15-17) that, by virtue of the Postal Reorganization Act (PRA), 39 U.S.C. 101 *et seq.*,

[6] Petitioners also did not put in evidence in the district court a third document appended to the petition, Pet. App. 21a-24a, purporting to be a report from a private investigator.

the Postal Service must be liable for thefts by its employees within the scope of their employment. That argument is readily disposed of and does not warrant this Court's review. The PRA waives the federal sovereign immunity of the Postal Service in certain respects. 39 U.S.C. 401(1). But, as *Dolan* made clear, that statute also provides that the Federal Tort Claims Act, including its exceptions, "shall apply to tort claims arising out of [Postal Service] activities." *Dolan*, 126 S. Ct. at 1256 (quoting 39 U.S.C. 409(c)); see *Loeffler* v. *Frank*, 486 U.S. 549, 557 (1988) (noting that "Congress expressly included several * * * specific limitations on the operation of the [PRA's] sue-and-be-sued clause," including the provision making the FTCA applicable). Thus, notwithstanding the Postal Service's capacity to "sue and be sued" for other matters in the same manner as a private business, a tort action against the Postal Service for employee theft remains governed by the FTCA and its exceptions, including the postal matter exception. And, for the reasons stated above, the postal matter exception bars petitioners' claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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